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No. 137, Original

4-16-2007

In The
Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

MONTANA'S REPLY BRIEF

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MONTANA'S REPLY BRIEF

The State of Montana hereby replies to Wyoming's Brief in Opposition to Motion for Leave to File Bill of Complaint (Wyoming's Brief or Wyo. Br.).

I. SUMMARY OF ARGUMENT

Montana seeks interpretation and enforcement of the Yellowstone River Compact (Compact). Wyoming seeks to avoid such interpretation and enforcement. First, Wyoming ignores Montana's claim that Montana's water uses at the time of the adoption of the Compact are protected from later developments in Wyoming. As a result, much of what Wyoming argues is non-responsive to Montana's central claim. Second, Wyoming argues that Montana fails to state a claim, based on Wyoming's interpretations of the Compact and its position that facts have been insufficiently alleged or researched. Factual matters, however, are outside the scope of the proper criteria for assessing a motion for leave. Also, Wyoming's interpretations of the Compact are contrary to the language of the Compact itself, as well as this Court's precedents interpreting similar interstate river compacts. Thus, Wyoming's assertions that the Compact excludes return flows, tributaries and groundwater pumping are untenable. The very existence of such legal disputes between sovereigns confirms the need for the Court to hear this case. Finally, as in other true interstate water compact cases, this Court is the only forum that can provide the relief requested. Wyoming's suggestion to the contrary must be rejected. Montana's Motion for Leave to File should therefore be granted.

II. ARGUMENT

A. Wyoming Ignores Montana's Central Claim.

Wyoming misstates Montana's basic claim, *i.e.*, that the Compact effected a complete apportionment of the Yellowstone River System that protects Montana's pre-1950 rights to the extent they were in use at the time the

Compact was enacted. It follows that when Montana's first-tier, or pre-1950 rights, are unsatisfied, Wyoming must curtail its second-tier and third-tier post-1950 uses in deference. See Montana's Brief in Support of Motion for Leave to File Bill of Complaint (Montana's Brief or Mont. Br.) 11-14. Inexplicably, Wyoming claims that Montana agrees that "these pre-1950 rights are to be administered within each state based only on intra-state prior appropriation. Therefore, this Court need not consider the Compact's first tier allocation under Section A of Article V." Wyo. Br. 2 (citation omitted).

On the contrary, Montana clearly asserts a claimed violation of Article V.A in that Wyoming has used post-1950 water in derogation of Montana's protected pre-1950 rights. See Bill of Complaint ¶¶ 8-13. In fact, the very section of Montana's opening brief cited by Wyoming for its allegation that Article V.A is not at issue, refutes that assertion: "Article V.A of the Compact requires Wyoming to curtail consumption of the water of the Yellowstone River System in excess of Wyoming's pre-January 1, 1950 consumption of such water whenever the amount of water necessary to satisfy Montana's pre-January 1, 1950 uses of such water is not passing the stateline." Mont. Br. 18-19 (quoting ¶ 3 of the Resolution rejected by Wyoming at the Dec. 6, 2006, Yellowstone River Compact Commission (Commission) meeting, reprinted in App. to Mont. Br. 4). This statement describes the practical effect of the apportionment by Article V.A of all waters in use on January 1, 1950. See Mont. Br. 18-20; see also *id.*, at 2-3, 11-16, 22.

Wyoming accepts Montana's description of the three-tier water allocation in the Compact. See Wyo. Br. 2-3. Yet Wyoming's entire brief is framed largely in reference to third-tier water uses, making much of the Wyoming Brief essentially irrelevant and non-responsive to Montana's most fundamental claim, which focuses on protection of Montana's first-tier water rights.

The opening words of the Compact and the language of Article V.A make clear that the water supply for water rights existing in *both* States was *apportioned and protected by the*

Compact, not simply administered under each State's domestic laws without regard to the Compact. Wyoming admits that the States agreed in the Compact that pre-1950 uses "would continue to be enjoyed under each state's water laws." *Id.*, at 2. Wyoming fails to appreciate, however, that the necessary effect of this provision is that Wyoming's post-January 1, 1950 uses must be curtailed when Montana's pre-1950 uses are unmet. Wyoming, being upstream of Montana, is in a position to take water to supply its post-January 1, 1950 (second- and third-tier) water rights first. How else but through curtailment of Wyoming's second-tier and third-tier water rights can the enjoyment of Montana's downstream first-tier rights be protected? Wyoming's Brief ignores this fundamental question.

B. Wyoming's Brief Confirms the Existence of Fundamental Differences Between the States Regarding Interpretation of the Yellowstone River Compact That Only This Court Can Resolve.

Wyoming takes issue with Montana's interpretation of the Yellowstone River Compact. The admitted existence of legal disagreements between the States on questions of Compact interpretation confirms the need for the Court to invoke its original jurisdiction in this case. See *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). In its Statement of the Case, Wyoming reveals immediately the fundamental disagreement between the States on the meaning of the Compact: "Montana's allegations that Wyoming has developed groundwater, sprinkler irrigation systems, new reservoirs, and new irrigated lands since 1950 are allegations of *conduct that does not violate the Yellowstone River Compact*." Wyo. Br. 1 (emphasis added). Thus, Wyoming has asserted as a matter of law that the actions Montana complains of, even if true, do not constitute Compact violations. Wyo. Br. 1; Bill of Complaint ¶¶ 8-12. Wyoming's assertions underscore the need for the Court to grant the Motion for Leave to resolve these

critical differences. Further, Wyoming's assertions are based on an interpretation of the Compact that is inconsistent with the Compact's plain language and with the Court's recent enforcement of similar interstate river compacts.

In addition to its allegations concerning Article V.A, Wyoming claims that the Compact "is intended to deal only with surface waters." Wyo. Br. 15. In support, Wyoming cites an article written in 1975, at a time before the Court had addressed the impact of interstate river compact enforcement on groundwater. *Ibid.* Since then, the Court has held, even where the words "groundwater," "well" or "depletion" do not appear in the compact, the effect of pumping on the compacted surface flows must be accounted for. For example, in *Kansas v. Nebraska and Colorado*, No. 126, Orig., Nebraska moved to dismiss the action because the Compact "does not apportion or allocate consumption of groundwater." First Report of the Special Master (Subject: Nebraska's Motion to Dismiss) 5 (2000). The Special Master recommended that Nebraska's argument be rejected: "The Republican River Compact restricts a compacting State's consumption of groundwater to the extent the consumption depletes stream flow in the Republican River Basin and, therefore, Nebraska's Motion to Dismiss should be denied." *Id.*, at 45. After receiving the Special Master's recommendation, the Court denied Nebraska's Motion to Dismiss. *Kansas v. Nebraska and Colorado*, 530 U.S. 1272 (2000). See also *Kansas v. Colorado*, 514 U.S. 673, 693-94 (1995) ("The Special Master concluded . . . that post-Compact pumping in Colorado had caused material depletions of the usable Stateline flows of the Arkansas River, in violation of the Arkansas River Compact. We agree with this determination. . . . " (brackets, internal quotations and citation omitted)).

Wyoming also asserts that increases in irrigation efficiencies, by the use of more consumptive methods of irrigation, cannot be the basis of a Compact violation. Wyo. Br. 17-20. Wyoming admits, however, that some of its irrigators have switched from flood to sprinkler irrigation, a more consumptive method. *Id.*, at 17-18. Further, Wyoming

claims that its irrigators could legally "consume *all* of what they diverted." *Id.*, at 18 (emphasis in Wyo. Br.). In other words, Wyoming claims that it could eliminate all return flows on which the pre-1950 water rights in Montana have relied. This assertion is directly contrary to the mandate of Compact Article V.A that the water rights in Montana "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." See App. to Compl. 8. Under the doctrine of appropriation, whenever enjoyment of a water right depends on the presence of return flows from upstream users, downstream junior priority appropriators are entitled to resist changes in use which materially affect their rights. Wyoming's law of prior appropriation recognizes this longstanding principle that water users may not "increase the historic amount of water consumptively used under the existing use, nor decrease the historic amount of return flow." Wyo. Stat. Ann. § 41-3-104 (2007); accord *Town of Pine Bluffs v. State Bd. of Control*, 649 P.2d 657, 659 (Wyo. 1982). Removing the return flows on which the downstream Montana water users depend therefore violates the appropriation doctrine recognized in both States and in Article V.A of the Compact.

Wyoming also asserts that the Compact governs only the mainstems of the Tongue and the Powder Rivers, and not their tributaries. Wyo. Br. 21. But the Compact language cannot sustain this position, nor has the Commission ever taken such a limited view.

The Tongue and Powder Rivers are "Interstate Tributaries" pursuant to Article II.F. App. to Compl. 5. Wyoming misconstrues this definition to exclude tributaries of the Tongue and Powder Rivers. Interstate Tributaries are obviously tributaries, and Article II.E defines "Tributary" as "any stream which in a natural state contributes to the flow of the Yellowstone River, including interstate tributaries *and tributaries thereof*." *Id.*, at 4-5 (emphasis added). Thus, the references to the Tongue River and the Powder River necessarily include the tributaries of those

rivers. Wyoming cannot simply write the term "Tributary" out of the term "Interstate Tributaries." The latter term is composed of a defined term which cannot be ignored.

Wyoming's argument also clashes with the Compact's treatment of the Little Big Horn River. The Little Big Horn is not directly tributary to the Yellowstone. Instead it flows into the mainstem of the Big Horn, which then empties into the Yellowstone. Compact Article II.F nevertheless explicitly excludes the Little Big Horn from the definition of "Interstate Tributaries," an exclusion that would make no sense if, as Wyoming claims, tributaries of tributaries were never included in the term in the first place.

Moreover, exclusion of the tributaries of the Tongue and Powder Rivers from the allocations of the Compact would be contrary to the States' intentions "to remove all causes of present and future controversy . . . with respect to the waters of *the Yellowstone River and its tributaries.*" *Id.*, at 1-2 (emphasis added). Thus, the whole fabric of the Compact is at odds with the asserted exclusion of tributaries of the Powder and Tongue Rivers from the Compact.

The longstanding practice of the Yellowstone River Compact Commission includes reservoirs on tributaries of the Tongue and Powder Rivers. See Annual Summary for Yellowstone River Compact Reservoirs or Lakes, reprinted as the App. to this Brief; App. A to Mont. Br. 1-2 (maps showing locations of reservoirs). For example, pursuant to its duties under Article III.C, the Commission collects, correlates and presents factual data on Lake DeSmet, with 197,500 acre-feet of post-1950 storage, water that would otherwise reach the mainstem of the Powder before it enters Montana. Under Wyoming's novel theory, neither Lake DeSmet nor any other reservoirs the Commission itself calls "Compact Reservoirs or Lakes" would be included in the Compact apportionment. All told, Wyoming would exclude from the Compact more than half of stateline flows that originate in the tributaries of the Tongue and Powder Rivers. See HKM Eng'g, Inc., Powder/Tongue River Basin Plan Final Report, Tables III-6, III-9 (2002).

As shown by the foregoing, Wyoming's unilateral and premature interpretations of the Compact are not supported by the Compact language itself. The Court has previously indicated that it considers compact interpretation to be a significant and appropriate function of the Court. See *Texas v. New Mexico*, 462 U.S. 554, 567-568 (1983). The Court has also traditionally allowed for full development of the record before making its determination of the nature and scope of obligations between sovereigns in the exercise of its original jurisdiction. See, *e.g.*, *United States v. Texas*, 339 U.S. 707, 715 (1950). In sum, significant issues of compact interpretation are disputed by the States, are not susceptible to resolution by the States, and need the authoritative determination of this Court.

C. Montana Should Be Allowed to Prove Its Compact Claims.

Wyoming asserts that Montana's claims are improperly pled and that Montana has failed to develop the factual basis for the Complaint. Each of these arguments is irrelevant.

First, Wyoming repeatedly asserts that the Court should deny leave to file Montana's Bill of Complaint because of an alleged lack of specificity in the Bill of Complaint. *E.g.*, Wyo. Br. 1, 5, 7, 10. Wyoming thereby seeks to inject pleading sufficiency as an additional criterion for exercise of the Court's original jurisdiction. Sufficiency of pleading, however, is not one of the criteria set out by the Court as the basis for deciding whether to exercise its original jurisdiction. See *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Even so, Montana has sufficiently pled Compact violations under the normal requirement of a "short and plain statement." See Sup. Ct. R. 17.2; Fed. R. Civ. P. 8. Wyoming is certainly on notice of Montana's claims. See, *e.g.*, Wyo. Br. 10, D-2.

Second, Wyoming argues that Montana has failed to allege injury. *E.g.*, Wyo. Br. 1, 5, 7, 10. Yet Montana specifically alleges that Wyoming has violated the Compact by depriving Montana of water to which it is entitled under

the Compact. Bill of Complaint ¶¶ 8-13. Moreover, in an interstate suit seeking enforcement of an established apportionment of interstate waters, injury other than invasion of a state's compact or decree rights, need not be pled at all. See *Nebraska v. Wyoming*, 507 U.S. 584, 592 (1993) ("In an enforcement action, the plaintiff need not show injury."), *Wyoming v. Colorado*, 309 U.S. 572, 581 (1940); Second Report of the Special Master (Subject: Final Settlement Stipulation), *Kansas v. Nebraska and Colorado*, No. 126, Orig., at DI-19 (2003). In short, Montana has fully pled injury even though it is unnecessary to do so.

Further, Wyoming asks the Court to accept its view of disputed facts as a basis for denying Montana's Motion for Leave to File. But the existence of disputed facts is simply an additional reason that the Court should grant Montana's Motion so that proper trial of such facts can be conducted with the assistance of a Special Master. As the Court said in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951), "A State cannot be its own ultimate judge in a controversy with a sister State." Wyoming, on the other hand, would have the Court in essence allow Wyoming to be "its own ultimate judge" in this controversy.

The Court should resist Wyoming's premature invitation to decide the relative strength of the evidence at this stage. The purpose of the Motion for Leave is to determine whether Montana should be given a chance to prove its claims. In determining whether the State of Nebraska would be allowed to amend its pleadings against Wyoming, the Court rejected similar arguments: "[A]t this stage we certainly have no basis for judging Nebraska's proof, and no justification for denying Nebraska the chance to prove what it can." *Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995). See also, *Kansas v. Colorado*, 185 U.S. 125, 147 (1902) (overruling demurrer to the bill of complaint on the grounds that Kansas should be allowed to discover facts necessary to prove its case). The present controversy presents a matter of high public importance, and Montana requests that it be given the opportunity to prove its claims.

D. The Compact Commission Is Not An Adequate Alternative Forum.

Wyoming agrees with Montana that "the Yellowstone River Compact Commission is not a forum charged with interpreting the Compact." Wyo. Br. 28. Wyoming nonetheless asserts that the Commission is an adequate alternative forum, apparently because of "Montana's inability to state a case under the Compact." *Id.*, at 29. But whether Montana has "stated a case under the Compact" is considered separately under the "seriousness and dignity" prong of the Court's test, not under the "alternative forum" prong.

Wyoming continues: "If Wyoming had violated the Compact and Montana had credible facts and valid legal arguments establishing such violations, then a dispute over Montana's Compact interpretations should go to this Court, and not the Compact Commission." Wyo Br. 28. Montana is simply asking that it be allowed to show the Court that its facts are "credible" and its legal arguments "valid." Such a showing is not a prerequisite to granting a motion for leave.

Wyoming asserts that the Commission provides a forum to obtain technical data. However, Wyoming never addresses whether the Commission could provide full relief. It cannot. Because the States disagree on the meaning and obligations of the Compact, they are likewise unable to engage in any meaningful information exchange or technical discussions. The Commission is not empowered to enforce the Compact or provide remedies for violations. See Compact, Art. III. Indeed, the Court has never found that an interstate compact commission provides an adequate alternative forum for enforcement of an interstate water compact.

There is no forum other than this Court that can resolve and provide relief for disputes between States with regard to an interstate compact: "To determine the nature and scope of obligations as between States, whether they arise from the legislative means of compact or the 'federal common law' governing interstate controversies, is the function and duty of the Supreme Court of the Nation."

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951); accord *Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992). No alternative forum exists.

III. CONCLUSION

The State of Montana's Motion for Leave to File Bill of Complaint should be granted.

Respectfully submitted,

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April 2007

Appendix*

ANNUAL SUMMARY OF CONTENTS FOR YELLOWSTONE RIVER COMPACT RESERVOIRS OR LAKES

[Contents are in acre feet. Reservoirs or lakes are listed in alphabetical order by drainage basin. Symbol: --, data not applicable or not available]

Reservoir or lake name	Pre-Compact 1950 water right	Post-Compact 1950 water right	Usable capacity	Usable contents on Sept. 30, 2004	Usable contents on Sept. 30, 2003	Change in contents
Bighorn River basin						
(Lake) Adelaide Reservoir[1]	1,450	4,760	6,210	800	--	---
Anchor Reservoir[2]	17,410	0	17,410	429	345	84
Bighorn Lake[2]	--	1,312,000	1,312,000	664,300	769,900	-75,600
Boysen Reservoir[2]	701,500	0	701,500	475,100	311,900	163,200
Buffalo Bill Reservoir[2]	456,600	190,000	646,600	438,800	465,700	-26,900
Bull Lake[2]	152,000	0	152,000	88,940	55,620	33,320
Greybull Valley Reservoir[1]	0	33,170	33,170	1,100	1,480	-380
Pilot Butte Reservoir[2]	34,600	0	34,600	15,630	9,290	6,340
Sunshine Reservoir[1]	52,990	0	52,990	6,600	1,800	4,800
Lower Sunshine Reservoir[1]	42,640	42,300	84,940	1,010	1,490	-480
Powder River basin						
Cloud Peak Reservoir[1]	3,400	172	3,570	0	0	0
Dull Knife Reservoir[1]	--	4,320	4,320	504	987	483
Healy Reservoir[1]	--	5,140	5,140	2,620	3,080	-460
Kearney Reservoir[1]	1,850	4,470	6,320	2,500	2,710	-210
Lake DeSmet	37,520	197,500	235,000	185,600	197,600	-12,000
Muddy Guard Reservoir[1]	--	2,340	2,340	0	492	-492
Tie Hack Reservoir[1]	1,650	2,440	2,440	2,440	2,440	0
Willow Park Reservoir[1]	4,460	--	4,460	2,230	1,320	910
Tongue River basin						
Bighorn Reservoir[1]	2,750	1,880	4,630	794	1,030	-236
Cross Creek Reservoir[1]	--	798	798	1	324	-324
Dome Reservoir[3,5]	1,840	188	2,030	1,180	1,480	-300
Granger Reservoir[1]	146	--	146	0	0	0
Last Chance Reservoir[1]	90	--	90	0	0	0
Martin Reservoir[1]	561	--	561	0	0	0
Park Reservoir[1]	7,350	3,070	10,360	4,160	4,150	10
Sawmill Lakes Reservoir[1]	--	1,280	1,280	703	0	703
Tongue River Reservoir[4]	68,000	11,070	79,070	26,620	39,050	-12,430
Twin Lakes Reservoir[1,5]	1,150	2,250	3,400	3,100	2,820	280
Weston Reservoir[1]	370	--	370	0	0	0
Willits Reservoir[1]	79	--	79	0	0	0

[1]Reservoirs managed by the State of Wyoming
[2]Reservoirs managed by Bureau of Reclamation
[3]Data are combined contents of Dome Lake and Dome Lake Reservoir
[4]Reservoir managed by the State of Montana
[5]Data are combined contents of Twin lakes Number 1 and Twin lakes Number 2

*Table from Yellowstone River Compact Commission Annual Report 2004 (Page 20)